Petition

Supreme Court, U.S.
FILED
APR 2 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1847

SUPREME COURT OF THE UNITED STATES

_____ TERM

A. T. COLLINS, ET AL PETITIONERS

v.

UNITED STATES OF AMERICA RESPONDENT

ON WRIT OF
CERTIORARI TO THE
UNITED STATES COURT
OF APPEALS FOR THE
SIXTH CIRCUIT

PETITION

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THE QUESTION PRESENTED FOR REVIEW

Whether the District Court judge's undisclosed leases of coal-producing lands required his disqualification under 28 U.S.C. § 455 and now entitle plaintiffs-appellants to relief from the final judgment under F.R.C.P. 60(b)(6).

LIST OF PARTIES

In the proceeding in the United States Court of Appeals for the Sixth Circuit, the plaintiffs-appellants were: A. T. COLLINS; BARBARA BOWLING JACKSON, Admx. of the Estate of GROVER BOWLING, JR., Deceased; SUSIE BUSH, Admx. of the Estate of TEDDY BUSH, Deceased; MILDRED COLLINS GRAY, Admx. of the Estate of KENOPLE COLLINS, Deceased; RUBY GHENT HOSKINS, Admx. of the Estate of CARL GHENT, Deceased; EMILIE GIBSON, Admx. of the Estate of ALFORD GIBSON, Deceeased; MARTHA GRIFFIN BOWLING, Admx. of the Estate of THEO GRIFFIN, Deceased; EDITH HARRIS, Admx. of the Estate of LESTER HARRIS, Deceased; ESTILL HENSON, Admx. of the Estate of DELBERT HENSON, Deceased; LITHA HENSON WAGERS, Admx. of the Estate of PRICE HENSON, Deceased; MAE HIBBARD,

Admx. of the Estate of WALTER HIBBARD, Deceased; ALVIE HOLLAND, Admx. of the Estate of GEORGE HOLLAND, Deceased; CHARLENE HOSKINS, Admx. of the Estate of BEN HOSKINS, Deceased; BRENDA HOSKINS BOWLING, Admx. of the Estate of FRANK HOSKINS, Deceased; MARY CATHERINE JONES, Admx. of the Estate of RUFUS JONES, Deceased; GERALDINE MINTON, Admx. of the Estate of JAMES MINTON, Deceased; MOSSIE MORGAN ARNETT, Admx. of the Estate of RUSSELL MORGAN, Deceased; BONNIE MAE ROBERTS, Admx. of the Estate of STANLEY ROBERTS, Deceased; BOBBIE SIZEMORE, Admx. of the Estate of ARNOLD SIZEMORE, Deceased; BETTY FAYE SMITH, Admx. of the Estate of WILBURN SMITH; Deceased; BARBARA SPURLOCK, Admx. of the Estate of JEFFIE SPURLOCK, Deceased; BETTY LEE WAGERS, Admx. of the Estate of ALBERT

WAGERS, Deceased; ELVIE WAGERS, Admx. of the Estate of ARMOND WAGERS, Deceased; JUANITA WAGERS NOLAN, Admx. of the Estate of ARNOLD WAGERS, Deceased; BRENDA WHITE ARNETT, Admx. of the Estate of ELMER WHITE, Deceased; LULA WHITEHEAD, Admx. of the Estate of ANDREW (DECKER) WHITEHEAD, Deceased. The defendant-appellee was the United States of America.

All plaintiffs-appellants listed above are petitioners herein.

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OPINIONS, ORDERS AND JUDGMENTS IN COURTS BELOW

Neither the January 13, 1982 Order of the U.S. Court of Appeals for the 6th Circuit nor the June 17, 1980 Memorandum Opinion of the U.S. District Court for the Eastern District of Kentucky were officially reported.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Order sought to be reviewed was filed in the United States Court of Appeals on January 13, 1982. The Order is reproduced in the Appendix hereto at page A-1.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED HEREIN

FRCP 60(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or

otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of

review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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28 U.S.C. § 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evi-

dentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concering the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in

the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness

in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable

interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The propriety interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary

interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(Note: This section was amended in 1978 to delete any reference to "referee in bankruptcy".)

STATEMENT OF THE CASE

History of Litigation

This action arises from a coal mine explosion near Hyden, Kentucky on December 30, 1970. Plaintiffs include one miner who was injured and the personal representatives of 25 miners who were killed. Plaintiffs' complaint in this case, brought under the Federal Tort Claims Act, alleged that the deaths and injuries were caused by negligent inspection and negligent enforcement by the defendant United States of certain mine safety regulations promulgated under the Federal Coal Mine Health and Safety Act of 1969, PL 91-173, 30 U.S.C. §§ 801 et seq. (1970). The promulgation and inspection provisions of the Act applied to all coal-mining operations, whether surface or underground. The Act, §§ 3(h), 101(i), 103(a); 30 U.S.C. §§

802(h), 811(i), 813(a) (1970).

After a trial before the District Court judge, Honorable H. David Hermansdorfer, sitting without a jury, judgment was entered for the United States. Plaintiffs appealed the case on the merits to the United States Court of Appeals for the Sixth Circuit.

During the pendancy of the appeal, plaintiffs filed a motion under F.R.C.P. 60(b)(6), requesting relief from the final judgment of the District Court, based upon the trial judge's failure to disqualify himself under 28 U.S.C. § 455. In a supplemental motion, the plaintiffs requested that the trial judge disclose the extent of his relevant business income. The trial judge has never complied with this request. During this time, the opinion of the Court of Appeals

on the appeal on the merits was issued.

On June 17, 1980, the district court denied plaintiffs' motions in all respects. Plaintiffs then appealed the District Court's denial of its motions to the United States Court of Appeals for the Sixth Circuit. On January 13, 1982, the Court of Appeals affirmed the judgment of the District Court.

STATEMENT OF PERTINENT FACTS

The complaint in this case was filed on April 27, 1973. A third-party complaint for indemnity was filed by the defendant United States against the operators of the mine on October 30, 1973. By Stipulation of Dismissal, the third party claims were dismissed without prejudice on May 27, 1977. A trial was held before the District Court judge, without a jury, on June 6-9, 1977. The court entered its Memorandum Opinion and

Judgment on November 30, 1977.

During this entire period, the trial judge had never disclosed to the plaintiffs' counsel that he had any interest in coal-mining activities. The counsel for plaintiffs was aware of rumor and inuendo that Judge Hermansdorfer had some interest, its nature and extent unknown, in the coal business. However, counsel had talked to no one who had actual knowledge of such interest, nor had counsel seen or been informed of documents which established such interests.

Subsequent to the appeal, in early May, 1980, counsel for plaintiffs was advised over the telephone by an employee of the Department for Natural Resources and Environmental Protection in Frankfort, Kentucky, that the Court's

name was familiar, though no coal-mining permits were in fact issued to the Court. Subsequently, that agency sent to plaintiffs' counsel copies of documents which were submitted with applications for coal-mining permits submitted by Paul Coffey. These documents were received on May 12, 1980 and were submitted in support of plaintiffs' motion. (A-14-A-27)

These documents established that on June 18, 1977 and on August 21, 1974, the Court executed leases to Paul Coffey for the purpose of mining coal on lands owned by the Court. On May 16, 1980, the plaintiffs filed a motion for relief under Rule 60(b)(6) from the judgment, alleging a violation of 28 U.S.C. § 455. Upon the response of the United States, which raised the question of "substantiality" of the Court's affected interests, the plaintiffs filed their

supplemental motion requesting that the Court disclose his relevant interest and income, in order to shed light on the issue of substantiality.

DISTRICT COURT DECISION

The District Court, on June 17, 1980, entered its Memorandum Opinion and Order, denying all plaintiffs' motions on the ground that there was no rational nexus between the Court's business interests, even if plaintiffs' allegations were given the most favorable interpretation, and the subject matter of the case. The Court held that no decision, either for the government or for the plaintiffs, would affect in any degree the fortunes of coal mine operators or coal lease holders such as the Court.

APPELLATE COURT DECISION

On January 13, 1982, the Court of Appeals affirmed the District Court's judgment. It held that there was no abuse of discretion, in that the connection between the present case and the Judge's financial interest was "speculative and tenuous", and that a substantial period of time had elapsed between trial and the raising of the issue herein.

REASONS FOR GRANTING THE WRIT

It is obvious that one of the grounds on which the Court of Appeals based its decision in this case was the "substantial period of time which had elapsed between the trial and the raising of the issue of disqualification".

If this reference to a timeliness requirement was based on F.R.C.P. 60(b), it should be noted that the rule only

requires that the motion be made within a reasonable time after the judgment from which relief is requested. The affidavit of plaintiffs' counsel in this case shows that the information upon which the motion is based was only recently made known to counsel, and that motion could not have been made in good faith at an earlier time. The motion was therefore made within a reasonable time.

If the Court's reference to timeliness is based on 28 U.S.C. § 455, the law as announced in cases from other jurisdictions clearly indicates that there could be no waiver.

That statute states in relevant part:

> "(a) Any justice, judge, magistrate, or referree in bankruptcy of the Unites States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

> (b) He shall also disqualify himself in the following circumstances:
>
> * * *
>
> "(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding:
>
> * * *
>
> "(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."

As shown by the affidavit of plaintiffs' counsel, there was no disclosure at all of these grounds to the plaintiffs. The Court further refused the plaintiffs' supplemental motion requesting disclosure. Thus there has

been, throughout this entire proceeding and even to this date, no way for the plaintiffs or the Court of Appeals to know the extent of the Judge's holdings.

The failure to raise the issue at trial is not a waiver. The Seventh Circuit Court of Appeals has reasoned that:

> ". . . The provisions are mandatory; they are addressed to the judge and require that he disqualify himself in certain circumstances. They were adopted because the drafters of the statute believed 'that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver.' They impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought. Moreover, although the Department of Justice recommended that the new section 455 should include some limitation of time 'to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before,' (H.R.Rep. No. 1453, 93d Cong., 2d Sess. 9 (1974) U.S.Code Cong. & Admin. News, 974, p. 6358), Congress did not incorporate this recommendation in the

> statute. Because it is obvious that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of the statute, these defenses to the petition a e without merit."

SCA Services, Inc. v. Morgan, 557 F.2d 110, 117, 40 A.L.R. Fed. 942, 952 (7th Cir. 1977). The rule has been followed by the trial courts as well, Bradley v. Milliken, 426 F.Supp. 929 (E.D. Mich. 1977), remanded on other grounds, 620 F.2d 1143 (6th Cir. 1980).

In contrast to the majority view represented by SCA Services, Inc. v. Morgan, supra, it has been held that the timeliness requirements of 28 U.S.C. § 144 apply in cases under 28 U.S.C. § 455. United States v. International Business Machines, 475 F.Supp. 1372 (S.D. N.Y. 1979). See also In Re International Business Machines Corp., 618 F.2d 923 (2nd Cir. 1980). Even under this view,

the plaintiffs' motion is not barred, since motions under 28 U.S.C. § 144 have always been held timely where, as here, the information upon which they were based was only recently discovered, Hall v. Burkett, 391 F.Supp. 237, 241 (W.D. Okla. 1975).; Annot., 24 A.L.R. Fed. 290 (1975). The purpose of such timeliness requirement is to prevent a party from speculating on the trial court's final judgment, withholding information learned before trial and then demanding disqualification of the Judge if the decision goes against the party. Roussel v. Tidelands Capital Corp., 438 F.Supp. 684 (N.D. Ala. 1977). As demonstrated by the affidavit of plaintiffs' counsel, this is not a case where the purpose of the timeliness rule, even if it applies under the statute, would be served. Plaintiffs' counsel could not have supported a motion

under 28 U.S.C. § 455 at any time before he obtained the documents submitted as exhibits, since it is well established that conclusions, opinions, rumors or vague gossip are insufficient. United States v. Haldeman, 559 F.2d 31, 134 (D.C. Cir. 1976), cert. den. sub nom. Ehrlichman v. United States, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); Hodgson v. Liquor Salemen's Union, 444 F.2d 1344, 1348 (2nd Cir. 1971).

In relying upon a ground which imposes a timeliness requirement upon 28 U.S.C. § 455, the 6th Circuit Court of Appeals has placed itself in conflict with the law as announced in other circuits as noted above. The Court should hear this case in order to resolve the question whether a timeliness requirement

is properly a part of that statute.

The Court also relied upon what it called a "speculative and tenuous" connection between the instant case and the trial judge's financial interest. First of all, the extent of the Judge's financial interest has never been clarified in this case, since the Judge was unwilling to respond to plaintiffs' motion that he reveal his coal-related interests. The litigant in this case must ask why the reluctance on the part of the Judge. Secondly, the Court is apparently holding that there can be no violation of 28 U.S.C. § 455 where the Court has no direct connection with the parties, counsel, or subject matter involved in the action. In so holding, the Court of Appeals has placed itself in conflict with the interpretations of this statute announced in other circuits. In addi-

tion, the important question of the extent of involvement with the subject matter of the case which will suffice to create a financial interest on the part of the Court, or will raise reasonable questions as to his impartiality, has never been decided by this Court. This is an important question which should now be addressed by the Supreme Court.

The plaintiffs have alleged that the Court individually had a financial interest which would be substantially affected by his ruling in this case. The question before the Court at that time, whether the United States was to be held liable for the negligent enforcement of coal mine safety regulations, was a question whose resolution would have no little effect upon all types of coal mining operations, including those conducted under the coal leases entered into

by the Court. A ruling in favor of plaintiffs would have resulted in an immediate toughening of the inspection standards and procedures of the Bureau of Mines. A more stringent attitude of inspection would have the effect of increasing the costs to operators, reducing the profitability of such operations, and would substantially affect the future of leases. If the leases contain royalty payments, which the plaintiffs were unable to discover by motion, then a closer connection between the productivity of such mines and the personal finances of the Court would be shown.

In addition, the Court should have disqualified himself for the reason that his impartiality might reasonably be questioned. Section 455(a) is a product of the self-enforcing Code of Judicial Conduct, Canon III, Standard C(1).

Roberts v. Bailar, 625 F.2d 125 (6th Cir. 1980). Disqualification under subsection (a) of the statute is based upon the appearance of partiality, as seen by a reasonable person. SCA Services, Inc. v. Morgan, supra at 116. The Congressional Committee Reports on the 1974 amendment of § 455 explain that, "if there is a reasonable factual basis for doubting the Judge's impartiality, the Judge should disqualify himself and let another Judge preside over the case." Even where the question is close, the Judge whose impartiality might reasonably be questioned must recuse himself from the trial.

That the impartiality of a Judge may be reasonably questioned without a direct connection between the Judge and a party or counsel is demonstrated by the case of

State of California v. Kleppe, 432 F.Supp. 1344 (C.D. Cal. 1977). That case involved attempts by a California agency to regulate certain operations of the defendant oil companies in the Santa Barbara Channel. Upon motion by the plaintiff, the Court held that it was required to disqualify itself, since the appearance of partiality could reasonably arise from the fact that the Court held stock in another oil company which held oil and gas leases in the same area. The Court noted that the fortunes of the latter oil company would be affected by any decision in the case, and that the financial interests of the Judge could possibly be affected. Id. at 1349.

It simply cannot be doubted that the appearance of partiality exists where a land owner, who was in the business of leasing land for the recovery of coal

from that land by commercial coal operators, is in a position to substantially affect the costs of those commercial operations. It is significant, in considering the appearance of partiality, that the most recent lease referred to in the documents, dated June 18, 1977, was executed at a time shortly after the trial of this case and before the Court's memorandum opinion and judgment were entered. Thus, at a time when it may be presumed the Court was actively weighing the evidence and formulating his decisions on the legal issues, he was also actively entering into business arrangements which linked his personal financial affairs to the fortunes of commercial coal operations. Whether the Court would be inclined by personal interests to follow the position favorable to the

Court's business associates is a question which reasonably may arise.

Although the trial court stated that the coal industry was not a party to the litigation and thus could not be economically affected by these actions for wrongful death and personal injuries, it should be noted that, until May 27, 1977, the operators of the interconnected mines where the explosion occurred were parties to this lawsuit, being third-party defendants. For almost four years, the operators participated in the action and faced the possibility, under the indemnity claims of the United States, that they would ultimately be liable for any damages awarded herein. During that time, the trial court never disclosed to counsel his interest in coal-producing lands, nor did the trial court disqualify himself as 28 U.S.C. § 455 required.

from that land by commercial coal operators, is in a position to substantially affect the costs of those commercial operations. It is significant, in considering the appearance of partiality, that the most recent lease referred to in the documents, dated June 18, 1977, was executed at a time shortly after the trial of this case and before the Court's memorandum opinion and judgment were entered. Thus, at a time when it may be presumed the Court was actively weighing the evidence and formulating his decisions on the legal issues, he was also actively entering into business arrangements which linked his personal financial affairs to the fortunes of commercial coal operations. Whether the Court would be inclined by personal interests to follow the position favorable to the

That potential for indemnity survived the dismissal of the operators. The dismissal was without prejudice to the claims of the United States. Under Kentucky law, a claim for indemnity accrues and the statutes of limitation begin to run, at the time the underlying liability is paid. City of Louisville v. O'Donaghue, 162 S.W. 1110 (Ky. 1914); Com. Dept. of Transp. v. All Points Constr. Co., 556 S.W.2d 171 (Ky.App. 1977). The Kentucky law governing this 1970 explosion is clear that payment of workmen's compensation benefits will not serve to insulate an employer from the indemnity claims of a third party who becomes liable to the employee. Kentucky Util. Co. v. Jackson County R. E. Coop. Corp., 438 S.W.2d 788 (Ky. 1968). A claim for indemnity would require the

United States to show that is was passively or secondarily negligent, that the operators created a hazard by which the United States, though not concurrently joining in the acts, was thereby exposed to liability to the plaintiffs. Id. at 790. The actions of the operators, as set out in the November 30, 1977, Memorandum Opinion of the Court, make it clear that such a showing would not be difficult in this case.

Thus, there existed at the time of the trial of this case, and at the time of the Court's Judgment, the very clear likelihood that ultimate liability might rest upon the coal mine operators. This case should never have been heard by a trial judge whose financial interest gave such an obvious and reasonable appearance of partiality toward the position favorable to the coal mine operators

involved and against the claims of the plaintiffs.

The circumstances of this relationship between the Court and commerical coal operators "might well make it reasonable for a member of the public or party or counsel opposed to question impartiality under § 455(a)." SCA Services, Inc. v. Morgan, supra at 116.

Therefore, under the interpretations of this statute as announced in other circuits, the Court was required by the statute to disqualify himself, and there was no requirement of any direct connection between the Court and the parties or counsel.

CONCLUSION

The opinion of the 6th Circuit Court of Appeals in this case has placed it in conflict with decisions of other cir-

cuits. This is so as to its attempt to impose a requirement of timeliness, and its attempt to impose a requirement of a direct relationship between the Court and the parties or counsel involved.

It is also important that this Court, which has never decided the question before, interpret the statute under which impartiality of federal trial judges is guaranteed to parties under our system of justice.

Plaintiffs had a right to a trial of their claims before a court, especially with no jury sitting, which had no interest in the case and by whose participation in the case there was raised no appearance of partiality. Likewise, Congress has indicated that the interests of the nation, considering that integrity is the very basis of cur reliance upon the judicial system, demand no less. The issue is so important that

Congress provided strict limitations on its waiver. The benefits run not just to the parties but also to the system of justice. As the Court pointed out in Bradley v. Milliken, supra at 942:

> ". . . The foundation of our adversary system is strengthened by the public's confidence in the judiciary. Nothing undermines that foundation more than a presiding judge who gives the appearance of partiality. . . ."

This Court should take the opportunity to interpret the reach and requirements of this statute, in order to give guidance to judges and parties in deciding whether recusal is required in a particular case. To that end, the petitioners request a hearing on the merits in order to demonstrate the failure of the district court to abide by the spirit of the statute, and the failure of the Court of Appeals to enforce the standards

as clearly announced in other cases.

Respectfully submitted

WILLIAMS, HOUSMAN & SPARKS

By _____
1700 Kentucky Avenue
Paducah, Kentucky 42001

Attorneys for Petitioners

CERTIFICATION

I hereby certify that three copies of this Petition have been served upon all parties required to be served by Rule 28 of this Court by mailing the same, first class postage prepaid, as follows: Solicitor General, Department of Justice, Washington, D.C. 20530. This the 2nd day of April, 1982.

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Appendix

APPENDIX

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NO. 80-3589

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

A. T. COLLINS, et al.,

Plaintiffs-Appellants,

O R D E R

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

_____/

Decided and Filed January 13, 1982

_____

BEFORE: EDWARDS, Chief Circuit Judge, JONES, Circuit Judge and CELEBREZZE, Senior Circuit Judge.

A.T. Collins and others (hereafter plaintiffs) appeal from the denial of their motion under Fed. R. Civ. P. 60(b)(6), which requested relief from the final judgment of the district court based upon the trial judge's failure to disqualify himself under 28 U.S.C. §455.

We affirm.

On December 30, 1970, an underground coal mine explosion near Hyden, Kentucky left a number of miners dead or injured. The complaint in this case was filed in April 1973 by an injured miner and the personal representatives of twenty-five miners who were killed. Plaintiffs relied upon the Federal Tort Claims Act, alleging that the deaths and injuries were caused by nelgigent inspection and negligent enforcement by the United States of certain mine safety regulations.

A bench trial was held in June 1977 and the district court filed its opinion in November 1977. The district court held that the United States could be held liable in tort for inadequate inspection of coal mines. However, the district court found that the mine operator's

grossly dangerous practices, and not the allegedly improper coal mine inspections, were the proximate cause of the disaster. Accordingly, the district court entered judgment for the United States.

On appeal, this court expressly reserved the question whether the United States could be liable for inadequate mine inspections, 1/ and affirmed on the basis of the district court's factual determination that the coal mine operator, not the United States, proximately caused the injuries. Collins v. United States, 621 F.2d 832 (6th Cir. 1980).

1/ This question was subsequently answered in Raymer v. United States, 660 F.2d 1136 (6th Cir. 1981), where this court held that an action did not lie against the United States under the Federal Tort Claims Act for negligent mine inspections, since under Kentucky law a private party conducting a similar inspection would not be liable.

On May 16, 1980, six days prior to this court's decision affirming the judgment of the district court, plaintiffs filed a motion to vacate the judgment in district court under Fed. R. Civ. P. 60(b)(6). Plaintiffs contended that the trial judge's ownership of land which had been leased to other persons for use in surface coal mining operations required his disqualification for the reasons that his impartiality might reasonably be questioned, and that his interests could be substantially affected by the outcome.

Plaintiffs state that during the period of trial their counsel "was aware of rumor and innuendo" regarding the trial judge's interest in coal mining activities, but their counsel lacked the means to establish such an interest until

May 12, 1980, almost three years after trial. Plaintiffs concede that neither the trial judge nor his leased property had any connection with the parties, but argue that a judgment entered against the United States would have caused an immediate toughening of inspection standards and procedures, which would have increased the costs and reduced the profitability of all coal mining operations, which in turn would have reduced the value of the trial judge's coal bearing lands.

The trial judge denied plaintiffs' motion in a memorandum opinion which stated that a decision for either plaintiffs or the defendant could not reasonably be viewed as having any impact on the leasehold coal interests of the trial judge.

In light of the speculative and

tenuous nature of any connection between the instant case and the trial judge's financial interests, and in light of the substantial period of time which had elapsed between the trial and the raising of the issue of disqualification, we cannot say that the trial jduge abused his discretion in denying plaintiffs' motion under Fed. R. Civ. P. 60(b)(6).

Accordingly, the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 74-326

A. T. COLLINS, ET AL, PLAINTIFFS,

VS. MEMORANDUM OPINION

UNITED STATES OF AMERCIA, DEFENDANT.

Decided and Filed June 17, 1980

This matter is before the Court on plaintiffs motion filed May 16, 1980 that this Court immediately recuse himself in this case. The basis for this request is that "the Court's ownership of certain lands and his financial interest as a lessor under certain coal leases on those lands. . required him to disqualify himself sua sponte from the proceedings...."

This litigation is a claim of negligence against the United States and

jurisdiction was asserted solely under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 et seq. The complaint charged that the proximate cause of the injuries and deaths of the miners was the failure of the United States to inspect the mine in accordance with the requirements of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. On December 2, 1977 judgment was entered on behalf of the United States and that judgment was affirmed on May 22, 1980. Collins v. United States, _____ F.2d _____ (6th Cir., No. 78-3125, May 22, 1980).

From the statements contained in plaintiffs' motions, affidavit and so-called "certificate of good faith", it clearly appears that plaintiffs undertake to raise a single issue for determination and that is: does the ownership of land

and the lease of mineral underlaying a portion of such land create circumstances which could lead a litigant to reasonably question[1] the impartiality of the trial judge?[2] The record does not disclose

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[1] "Any...judge...of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a).

[2] The government's arguments on procedural matters are not addressed because the dispostion of the primary issue disposes of the matter.

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any factually based nexus between the parties involved in this litigation or the subject matter of the litigation and the trial judge's family ownership of land and the management thereof. 28 U.S.C. §455(b).

The Court feels obligated to view plaintiffs' factual assertions in a light

most favorable to the plaintiffs and this Court has done so. After effecting this procedure the conclusion is inescapable that plaintiffs' desire to rely on two assertions: Firstly, that a decision in favor of plaintiffs would have an adverse effect on the coal industry and thereby upon this Court and private interests and, secondly, that this Court would be fearful that reprisals taken by the government would adversely affect his own interests if a decision against the government were entered. The latter suggestion is not amenable to analysis because no factual basis for it was asserted.

This Court would respectfully point out that the record upon which this matter must be decided fails to disclose how a decision favorable to the United

States could affect the underground coal industry; likewise, it is not shown how a decision favorable to the plaintiffs could have affected the underground coal industry. This Court concludes the record makes it crystal clear that the coal industry, not being a party to the litigation, could not be economically affected by the actions for wrongful deaths and personal injuries. A decision in favor of either of the plaintiffs or the defendant government could not reasonably be found to spill over as a matter of rational significance into the leasehold coal interests of the Court.

This Court's interest in the ownership and leasing of mineral for surface mining is not only remote from the underground coal industry, such interest has no rational nexus to this Federal Tort Claims action. There is no basis

asserted by plaintiffs or otherwise known to this Court upon which any aspect of the instant litigation affects, directly or indirectly, proximately or remotely, the surface coal mine industry.

The record supporting the plaintiffs' motion and all collateral issues does not establish any factual basis upon which a litigant might base a reasonable suspicion of the impartiality of this Court in this action.

Accordingly, the plaintiffs' motions will be denied and a final order will be entered with this Memorandum Opinion.

This the 17 day of June, 1980.

/s/ H. David Hermansdorfer, Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 74-326

A. T. COLLINS, ET AL, PLAINTIFFS,

VS. O R D E R

UNITED STATES OF AMERICA, DEFENDANT.

Filed June 17, 1980

Plaintiffs' motion that this Court recuse itself from a consideration of this case and all collateral issues raised in connection therewith are DENIED.

This is a final Order.

IT IS SO ORDERED this the 17 day of June, 1980.

/s/ H. David Hermansdorfer, Judge

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION UNDER FRCP 60(b) - May 14, 1980

Comes the affiant, Charles A. Williams, and after being duly sworn states as follows:

1. That he is counsel for the plaintiffs in this action;

2. That in early May, 1980, he spoke by telephone with the Department for Natural Resources and Environmental Protection in Frankfort, Kentucky and was advised that the Court was the owner of certain lands on which a mining permit was issued to Paul Coffey, pursuant to a lease from the Court to Coffey;

3. That on May 12, 1980 the documents attached hereto as Exhibits A-1, A-2, A-3, B-1, B-2, B-3, C-1, C-2, C-3 were received by the affiant in confirmation of said telephone call;

4. That it appears from said docu-

ments that on June 18, 1977, and on August 21, 1974, the Court executed leases to Paul Coffey for the purpose of mining coal on lands owned by the Court;

5. That at no time during the course of this action did the Court make any disclosure to the plaintiffs of any interests in coal mining;

6. That, although on prior occasions the affiant had been aware of rumors and gossip indicating that the Court had certain interests in coal lands, the affiant had never seen documents which would support such allegations, nor was the tenor of such rumors such as to indicate the extensive holdings indicated by the attached documents;

7. That the present Motion could not have been made by the affiant in good faith at any prior time;

8. That the affiant would not be adequately representing his clients in this action if he failed to make proper Motion based upon the newly acquired information.

Further the affiant sayeth not.

/s/ Charles A. Williams

Jurat

This is to certify that the plaintiffs' Motion for Relief under Rule 60(b) and the above Affidavit in support are made in good faith.

This the 14th day of May, 1980.

/s/ Charles A. Williams

EXHIBIT A-1

NOTICE OF INTENTION TO MINE

In accordance with the provisions of KRS 350.055, notice is hereby given that: Paul Coffey Construction Co., P.O. Box 215, Raceland, Ky. 41169 intends to file an application for the surface mining of approximately 31 acres located east of Princess in Boyd County. The proposed operation is approximately 1 mile west of State Route 180's junction with U.S. Route 60 and located east of Williams Creek at 38 deg. 23'50" north latitude and 82 deg. 44'54" west longitude. The surface of the area to be mined is owned by: David Hermansdorfer. A brief description of the kind of mining activity proposed is: Strip mining. The application will be filed at the Division of Reclamation, Grayson Area Office, 620 West Main St., Grayson, Kentucky 41143.

* * *

Published June 28, 1977.

EXHIBIT A-2

PAUL COFFEY # 11

ATTACHMENT # 3

Names and addresses of surface owners of area of land affected.

David Hermansdorfer
2801 Ranch Court
Ashland, KY 41101

* * *

ATTACHMENT # 5

Names and addresses of the owners of the coal to be mined.

David Hermansdorfer
2801 Ranch Court
Ashland, KY 41101

* * *

RECEIVED

Jul 8 1977

DIVISION OF RECLAMATION

GRAYSON OFFICE

EXHIBIT A-3

ATTACHMENT # 6

COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION
DIVISION OF RECLAMATION
Frankfort, Kentucky 40601

AFFIDAVIT

(APPLICANT'S SOURCE OF LEGAL RIGHT
TO MINE)*

Affiant, being first duly sworn, states to the best of his knowledge and belief that the source of his legal right to mine the coal on the area of land affected by the permit application is by Lease from H. David Hermansdorfer dated the 18 day of June, 1977, and that said instrument is valid in all respects and is not currently the subject of any litigation in a Court of Law.

/s/ Paul Coffey
APPLICANT

(Jurat)

EXHIBIT B-1

NOTICE OF INTENTION
TO MINE

In accordance with the provisions of KRS 350.055, notice is hereby given that: Paul Coffey Construction Company, P.O. Box 215, Raceland, Ky. 41169 intends to file an application for the surface mining of approximately 125 acres located north of Princess in Boyd county. The proposed operation is approximately two miles north of State Route 5's junction with U.S. Route 60 and located east of Williams Creek at 38-24-45 north latitude and 82-44-38 west longitude. The surface of the area to be mined is owned by David Hermansdorfer, Mart Horton, Charles Walker, Walter Duncan, Benson Duncan and Peter McEachern.

A brief description of the kind of

mining activity proposed is: surface mining.

* * *

Published November 18, 1977.

EXHIBIT B-2

PAUL COFFEY CONSTRUCTION CO.
P.O. BOX 215
RACELAND, KENTUCKY 41169

PHONE 836-6331

ATTACHMENTS # 3 AND # 5

Names and addresses of owners of the area of land affected and owners of coal to be mined.

David Harmansdoerfer
2801 Ranch Court
Ashland, KY

* * *

RECEIVED

DEC 7 1977

Division of Operations & Enforcement
Grayson Office

A-23

EXHIBIT B-3

ATTACHMENT # 10

PAUL COFFEY # 13

COMMONWEALTH OF KENTUCKY
DEPARTMENT FOR NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION
DIVISION OF RECLAMATION
Frankfort, Kentucky 40601

AFFIDAVIT

(APPLICANT'S SOURCE OF LEGAL RIGHT TO MINE)*

Affiant, being first duly sworn, states to the best of his knowledge and belief that the source of his legal right to mine the coal on the area of land affected by the permit application is by Lease from David Hermansdorfer dated the 21th day of August, 1974, and that said instrument is valid in all respects and is not currently the subject of any litigation in a Court of Law.

/s/ Paul Coffey
APPLICANT

(Jurat)

EXHIBIT C-1

NOTICE OF INTENTION
TO MINE

1. In accordance with the provisions of KRS 350.055, notice is hereby given that Paul Coffey Construction Co., P.O. Box 215, Raceland, Ky. 41169 intends to file an application for the surface disturbance mining of approximately 7 acres located northeast of Princess in Boyd County. The proposed operation is approximately 2 miles west of State Route 180's junction with U.S. Route 60 and located east of Williams Creek, Latitude 38-24-16 N, Longitude 82-44-45 W. The surface of the area to be mined is owned by David Hermansdorfer. A brief description of the kind of mining activity proposed is surface mining. The application will be filed at the Bureau of Surface Mining Reclamation and Enforcement,

Grayson Area Office, 620 West Main St.,
Grayson, Kentucky 41143.

* * *

Published Aug. 31, 1978.

EXHIBIT C-2

APPLICATION NUMER 101-0001

34. SURFACE OWNERS OF THE AREA PROPOSED FOR DISTURBANCE UNDER THIS APPLICATION.

David Hermansdorfer
2801 Ranch Court
Ashland, KY

35. MINERAL OWNERS OF THE AREA PROPOSED FOR DISTURBANCE UNDER THIS APPLICATION.

David Hermansdorfer
2801 Ranch Court
Ashland, KY

* * *

EXHIBIT C-3

October 9, 1978

Department for Natural Resources and Environmental Protection Bureau of Surface mining reclamantion and enforcement

To whom it may concern:

I have agreed to the proposed change from forest land to hayland or pasture, in the permit application of Paul Coffey Construction Co. No. 010-0001. This proposed change is compatible with adjacent reclaimed land which is hayland or pasture.

Yours truly,

/s/ David Hermansdorfer

(Jurat)

Opposition

Office - Supreme Court, U.S.
FILED
MAY 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1847

In the Supreme Court of the United States

OCTOBER TERM, 1981

A. T. COLLINS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1847

A. T. COLLINS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners include one injured miner and the survivors of 25 deceased miners who were victims of a coal mine disaster in Hyden, Kentucky, on December 30, 1970. In 1973, petitioners filed suit under the Federal Tort Claims Act against the United States for the alleged failures of government mine inspectors properly to inspect the Hyden mines and to enforce the Federal Coal Mine Health and Safety Act of 1969. After trial, the district court concluded that the Hyden disaster proximately resulted from the mine operator's unforeseeable improper mining practices, not from the government's inspection activities. The court of appeals affirmed the district court's judgment against petitioners, and this Court denied certiorari. 621 F. 2d 832, cert. denied, 449 U.S. 955 (1980).

More than two years after the trial, and just six days prior to the court of appeals' decision, petitioners requested the district court to vacate its judgment under Rule 60(b)(6),

Fed. R. Civ. P., on the ground that the trial judge owned properties that were leased for surface coal mining and therefore should have recused himself. The district court denied the motion, concluding that "[t]he record * * * does not establish any factual basis upon which a litigant might base a reasonable suspicion of the impartiality of this Court * * *" (Pet. App. A-12). The court observed that: (1) a decision for or against the government in a Tort Claims Act suit would not "spill over as a matter of rational significance into the leasehold coal interests of the Court"; and (2) the court's ownership of surface coal mining property would not be affected, "directly or indirectly, proximately or remotely," by this lawsuit involving an underground mine (*id.* at A-11 to A-12).

The court of appeals affirmed "[i]n light of the speculative and tenuous nature of any connection between the instant case and the trial judge's financial interests, and in light of the substantial period of time which had elapsed between the trial and the raising of the issue of disqualification * * *" (Pet. App. A-5 to A-6). Because the court of appeals' decision is correct and there is no conflict among the circuits, this case does not warrant review in this Court.

1. A federal judge must disqualify himself when he "has * * * any * * * interest that could be substantially affected by the outcome of the proceeding," or more generally, when "his impartiality might reasonably be questioned." 28 U.S.C. 455(b)(4) and (a). Although there is no suggestion that the trial judge in this case had any connection with the Hyden mines where the mine disaster occurred, petitioners contend that Section 455 required the judge's disqualification due to his interest in properties leased for surface coal mining. The court of appeals correctly concluded that any connection between the trial judge and this suit was too remote and speculative to require disqualification.

Petitioners reason that the trial judge was predisposed to rule for the government in this FTCA suit, because a judgment for petitioners "would have resulted in an immediate toughening" of government coal mine inspections, which "would have the effect of increasing the costs to operators, reducing the profitability of such operations, and would substantially affect the future of [coal] leases" (Pet. 16).[1] None of this is certain, of course, or even likely. Petitioners cannot demonstrate that a change in government inspection activities would inexorably have followed upon a tort judgment against the United States. And, even if such a change occurred, the "toughened" inspections would not necessarily reduce the "profitability" of coal mine operations or the value of coal leases. Profitability depends on unpredictable market forces, not on the vigor of government inspections. The highly speculative nature of petitioners' disqualification claim becomes particularly apparent in light of the fact that the trial judge's property holdings are in surface mining lands, and petitioners' suit involves underground mines. The dangers of above-ground mining obviously differ from the hazards of underground mining.

The remote connection upon which petitioners base their claim is not what Congress intended in Section 455 when it required judges to recuse themselves in cases where their personal interests could be "substantially" affected or where their impartiality might "reasonably" be questioned. See, *e.g., In re New Mexico Natural Gas Antitrust Litigation*, 620 F. 2d 794, 796-797 (10th Cir. 1980); *In re Virginia*

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[1] In fact, the district court rejected the contention that no action could be brought against the government under the Federal Tort Claims Act for inadequate mine inspections. The court of appeals expressly reserved this question on the first appeal in this case and subsequently accepted the government's position in *Raymer* v. *United States*, 660 F. 2d 1136 (6th Cir. 1981), cert. denied, No. 81-1409 (Apr. 26, 1982). See Pet. App. A-2 to A-3.

Electric & Power Co., 539 F. 2d 357, 368 (4th Cir. 1976); *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 441 F. 2d 631, 635 (5th Cir.), cert. denied, 404 U.S. 941 (1971); see also S. Rep. No. 93-419, 93 Cong., 1st Sess. 5 (1973). The court of appeals' decision, therefore, is consistent with Section 455 and with the decisional law.[2]

2. Petitioners also challenge the court of appeals' reliance on petitioners' delay in seeking disqualification and ask this Court to resolve a purported conflict between the circuits on the question whether Section 455 incorporates a timeliness requirement (Pet. 10-14). Compare, *e.g.*, *SCA Services, Inc.* v. *Morgan*, 557 F. 2d 110, 117 (7th Cir. 1977), with *In re International Business Machine Corp.*, 618 F. 2d 923, 932 (2d Cir. 1980); cf. 28 U.S.C. 144. But this Court need not consider in this case whether Section 455 requires timely disqualification motions, because petitioners are entitled to no relief on the merits and because the vehicle petitioners used for seeking relief was Rule 60(b), Fed. R. Civ. P. That Rule expressly requires that applications for

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[2]Petitioners argue (Pet. 17-18) that the court of appeals' ruling conflicts with *State of California* v. *Kleppe*, 431 F. Supp. 1344 (C.D. Cal. 1977). But there the district judge concluded that his decision would "vitally affect" a company that he formerly represented as counsel and in which he maintained a significant investment. *Id.* at 1349. Here, by contrast, the effect of the trial judge's FTCA decision on his financial interests is at best speculative, and probably nonexistent. Petitioners also point to the potential availability of an indemnity suit by the United States against the Hyden coal operator as a ground for disqualification (Pet. 21-22). Petitioners' point is obscure, because the trial judge not only has no interest in the Hyden mine but, in fact, operates no mine at all. If petitioners are correct that the slightest speculative benefit deriving from litigation justifies disqualification, the result would be unworkable. Judges with real estate or industrial investments, for example, presumably would be disqualified not merely from cases involving their particular investments, but from any case against an industrial corporation or involving a real estate dispute, for all such suits conceivably could affect the trial judge in the same indirect fashion as feared by petitioners here.

relief from judgments be made within a "reasonable time." Without that "reasonable time" requirement, judgments would never be put to rest and would always be subject to collateral attack by imaginative litigants after the entry of judgment.

The court of appeals' suggestion that petitioners waited too long to seek Rule 60(b) relief (Pet. App. A-6) was fully justified. In the affidavit accompanying the Rule 60(b) motion, petitioners' counsel admitted that "on prior occasions [he] had been aware of rumors and gossip indicating that the Court had certain interests in coal lands" (Pet. App. A-15). Yet he made no effort to investigate these rumors, or to inform the district court of his concerns, until two and a half years after the judgment and, indeed, until after the oral argument on the appeal.[3] This lack of diligence undercuts petitioners' belated attempt to upset the judgment against them, particularly in view of the slender basis invoked in support of disqualification (see page 3, *supra*). Even if there were room for question on this point, there would be no reason for this Court to second-guess the factual determinations of the district court and the court of appeals.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1982

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[3]The insufficiency of petitioners' stated justification for delay is apparent from the fact that only a single telephone call led to receipt of the information upon which the Rule 60(b) motion was based. See Pet. 4-5; Pet. App. 14.